INDEX

Subject Index

Table of Cases Cited

Table of Cases Cited

IN

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

NITED AIR LINES, INC., A CORPORATION; AND CATALINA AIR TRANSPORT, A CORPORATION,

Plaintiffs,

CIVIL AERONAUTICS BOARD,

Intervenor,

vs.

UBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Defendants

Before: HON. WILLIAM E. ORR, Circuit Judge; HON. UIS E. GOODMAN, District Judge; HON. EDWARD P. URPHY, District Judge.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme urt of the United States, as amended, defendants-

appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Three-Judge District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Northern District of California, Southern Division, is reported in 109 F. Supp. 13. A copy of the opinion, findings of fact, conclusions of law, judgment, and order denying motion for a new trial are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on January 28, 1953. A motion for new trial was filed February 6, 1953, and this motion was denied February 20, 1953. A petition for appeal is presented to the district court herewith, to-wit, on March 27, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Rorick* v. *Board of Com'rs. of Everglades Drainage District*, 307 U. S. 208, 83 L. Ed. 1242; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. Ed. 1088; *Palmetto Fire Insurance Co.* v. *Conn.*, 272 U. S. 295, 305, 71 L. Ed. 243, 247; *Brucker* v. *Fisher*, 49 F. 2d 759.

Question Presented

Where the Secretary of the defendant-appellant California Public Utilities Commission has by letters instructed plaintiff-appellee United Air Lines, Inc., to file tariffs covering its operations between the mainland of California and Santa Catalina Island, and where the Attorney and Chief

Counsel for said Commission has testified that, if the facts remain the same, in a formal proceeding proposed to be instituted before said Commission because of United's refusal to file such tariffs he will advise said Commission it has jurisdiction to establish rates covering such operations, are United and Catalina Air Transport, plaintiffs-appellees herein, and the Civil Aeronautics Board, intervenor-appellee, entitled (1) to a declaratory judgment issued by a Three-Judge Federal District Court that the Civil Aeronautics Board has exclusive jurisdiction over said plaintiffs-appellees in their operations over such route, and that the said Commission and its members and legal advisers, defendants-appellants herein, have no jurisdiction or power of regulation over the same, and (2) to an injunction issued by a Three-Judge District Court restraining the defendant-appellant Commission and its members, employees, agents, and attorneys from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route.[1]

Statutes Involved

The first sentence of the second paragraph of Section 22 of Article XII of the California Constitution; Sections 1701 through 1706, 1731, 1756, and 2107 of the California Public Utilities Code (formerly Sections 53, 60, 61, 62, 64, 65, 66 (1st and 2nd sentences), 67 (first three sentences), and 76(a) of the California Public Utilities Act); Sections 1331, 1337, 1342, and 2201 of Title 28, United States Code (62 Stats. 930, 931, 932, and 964 as amended by 63 Stats. 105); and Section 1(2), 1(10), 1(21), 403, 404(a) and 404(b) of the Civil Aeronautics Act of 1938 (52 Stats. 977, 992, and

[1] All the points raised in the assignment of errors are also presented. The Question stated above sets forth the major issue.

993, as amended), (49 U. S. C. A. 401(2), 401(10), 401(21), 483, 484(a), and 484(b) are set forth in Appendix B hereto.

Statement

The appellee-plaintiff Catalina Air Transport (formerly Wilmington-Catalina Airline, Ltd.) is a California corporation which on October 13, 1939, obtained a certificate of public convenience and necessity from the Civil Aeronautics Authority to operate as an air carrier between the mainland of California and Santa Catalina Island.

On March 7, 1946, a contract was entered into between said Catalina Air Transport and appellee-plaintiff United Air Lines, Inc., for the operation of the line by United Air Lines, Inc. This arrangement was approved by the Civil Aeronautics Board.

None of the rates established by Catalina Air Transport or United Air Lines were ever filed with or approved by the defendant Public Utilities Commission of the State of California.

In the year 1951 there was an exchange of correspondence over the question of the jurisdiction of said Commission and the duty of United to file its tariffs with said Commission. The following letters were exchanged between representatives of United Air Lines, Inc., and the Public Utilities Commission, said letters being dated, respectively, August 6, 1951; September 10, 1951; September 20, 1951; October 11, 1951; November 6, 1951; November 30, 1951; December 5, 1951; and December 27, 1951. Copies of said letters are attached hereto as Exhibit C, and made a part hereof.

The defendant Commission now claims and asserts and from time to time in the past has claimed and asserted that the rates, fares and charges covering said operations, to the extent that such operations are not a part of in-

terstate, foreign or overseas commerce as defined (according to defendants' interpretation) in Section 1(21) of the Civil Aeronautics Act of 1938 (59 U.S.C.A. 401(21)), i.e., to the extent such operations are only between points on the mainland of California and Santa Catalina Island, are entirely under the control and regulation of said defendant Commission, and that pursuant to the first sentence of the second paragraph of Section 22 of the California Constitution and Sections 1701 through 1706 of the California Public Utilities Code said defendant Commission has jurisdiction to establish such rates, fares and charges by requiring defendants to file tariffs with the defendant Commission.

On February 27, 1952, a conference was held at which Mr. Treadwell and Mr. Laughlin, attorneys for plaintiffs, and Judge McKeage and M. Cline, attorneys for defendants, were present. Mr. Treadwell testified that at this conference the defendant Everett C. McKeage, Chief Counsel for defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission. The findings proposed by plaintiffs contained such a finding of fact. Defendants requested that such proposed finding be stricken on the ground that although the finding is supported by testimony of Mr. Treadwell it is not supported by the preponderance of the evidence. The statements of counsel for defendants and the testimony of Judge McKeage show that there was and is no intention on the part of the defendants to institute penalty actions against United by reason of its refusal to file tariffs covering its operations between Los Angeles-Wilmington-Long Beach and Avalon until after the jurisdictional question is finally settled and that they do not intend then to seek any penalties except those which

accrue after a contumacious refusal on the part of United to comply with a final order of the defendant Public Utilities Commission. (Reporter's Transcript of Proceedings 11/21/52, pages 30-33, 38, 45, 47-49, 61-64.)

In this connection line 22, page 61 through line 21, page 62 of the Reporter's Transcript of Proceedings on 11/21/52, reads as follows:

> "Mr. Phelps: Q. I shall just ask the Judge [witness Judge McKeage] to describe what the position of the commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.
>
> "Mr. Treadwell: We object to that, your Honor,
> • • •
>
> "Judge Orr: The objection is overruled.
>
> "A. [Witness Judge McKeage]. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.
>
> "We have never changed our position. That was our intent then. That is our intent now."

Furthermore, it is a matter of record that the action was not filed by plaintiffs in the Federal District Court until June 25, 1952, almost four months after the conference of February 27, 1952. This would certainly indicate an absence of pressure on United rather than the threat of a penalty of $2,000 per day. (Reporter's Transcript of Proceedings 11/21/52, page 66.)

The Three-Judge District Court struck the following from plaintiffs' proposed findings in adopting them as their own:

> "• • • Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission."

On June 25, 1952, plaintiffs filed their complaint in the United States District Court seeking declaratory relief and an injunction against defendants. Plaintiffs' principal claim for relief is based on the allegation that defendant Commission claims and asserts that plaintiff United in failing to file its tariffs with the defendant Commission has violated Section 2107 of the Public Utilities Code and that said plaintiff has become liable for penalties in the sum of $2,000 per day for every such violation; that said defendant Commission has threatened to bring suit to recover such claimed penalties unless said tariffs on the route in question are filed with said Commission.

The Three-Judge District Court was convened because plaintiffs claim that Section 2107 of the California Public Utilities Code is in violation of the Constitution of the United States. The District Court concluded that a substantial question would have been presented as to the constitutionality of the penalty provisions, if reached, but did not reach this question.

The District Court found that the statutes of the State of California provide for penalties up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission, and that the refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any

refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. The District Court further found that apart from these risks, United is confronted with the necessity for incurring the expenditures (in excess of $3,000) incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented.

The District Court found that Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles.

The District Court concluded that the intervening waters between the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California. The District Court further concluded that plaintiffs' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and the powers conferred upon and exercised by the Civil Aeronautics Act leave no room for State regulation of these operations.

On January 28, 1953, the Three-Judge District Court (1) entered a declaratory judgment against defendants decreeing that the Civil Aeronautics Board has exclusive jurisdiction over plaintiffs-appellees in their operations over

the route between the mainland of California and Santa Catalina Island, and that the Public Utilities Commission of the State of California and its members and legal advisers, defendants-appellants herein, have no jurisdiction or power of regulation over the same, and (2) issued an injunction permanently restraining the defendant-appellant Commission and its members, employees, agents, and attorneys from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route.

The motion for new trial filed by defendants February 6, 1953, was heard February 19, 1953, and was denied February 20, 1953.

The Questions Are Substantial

The issues involved in this case are substantial and are of great importance to the defendant Commission and to the people of the State of California.

At the inception of the administrative processes of the defendant Commission the plaintiffs without exhausting their administrative remedies and their remedies in the courts of the State of California have sought and obtained from the Three-Judge District Court a declaratory judgment resolving the issues and an injunction permanently enjoining defendant Commission from in any way controlling or regulating plaintiffs' route between the mainland of California and Santa Catalina Island.

1. The District Court has erroneously found that the statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission. The first sentence of the second paragraph of Section 22 authorizes the defendant Commission to establish rates for

air carriers. No provision of the California Constitution nor of the Public Utilities Code requires air carriers to file tariffs with the Commission. If the injunction issued by the Federal District Court is dissolved by the United States Supreme Court the defendant Commission will institute an investigation proceeding before itself in accordance with procedures established in Sections 1701 through 1706 of the Public Utilities Code. If the Commission determines that it has jurisdiction it will proceed to establish rates covering plaintiffs' operations in question or will order plaintiffs to file tariffs of its rates covering such operations.

Only after a formal order of the Commission requiring plaintiffs to file tariffs has become final will plaintiffs be subject to the penalty provisions of Section 2107 of the Public Utilities Code by reason of refusal thereafter to file tariffs covering their operations.

2. The letters from the commission Secretary instructing plaintiff United to file its tariffs (See Exhibit C attached hereto) are not orders of the defendant Commission which will support a penalty action or a contempt proceeding for refusal to comply therewith, as they were not issued pursuant to the procedural provisions of the Public Utilities Code and do not comply with the requirements of due process.

Such letters were merely preliminary to the issuance of an order of investigation and were notice to plaintiff United that it might expect an order of investigation to be instituted as provided by the applicable law. Furthermore, a voluntary compliance by plaintiff United with the instruction to file its tariff would have obviated the necessity of the issuance of an order of investigation.

The letters from the Secretary of the Commission were the beginning of the administrative process rather than the end. The testimony of Judge McKeage quoted above under

the heading "Statement" (pages 61 and 62 of the Reporter's Transcript of the hearing on November 21, 1952) fully explain the purport of the letters and the intention of the Commission respecting the procedure to be followed in seeking to require plaintiff United to file its tariff.

No penalty action will be brought against plaintiff United because of its prior and present refusal to file with defendant Commission tariffs covering its Catalina operations, not only because the defendant Commission has no intention of instituting such a penalty action, but also because there is no legal basis for instituting any penalty action at the present time.

3. No claim or assertion of right has been made by the defendant Commission against plaintiffs under Section 2107 of the Public Utilities Code by reason of plaintiff United's failure to file tariffs covering the operations in question. Therefore, there is no substantial question concerning the validity of Section 2107 under the Federal Constitution. The Three-Judge District Court should have so found and dissolved itself.

California Water Service Co. v. *City of Redding,* 304 U. S. 252, 82 L. Ed. 1323;

City of Springfield v. *U. S.,* 99 F. 2d 860, cert. den. 306 U. S. 650, 83 L. Ed. 1049.

4. Assuming for the sake of argument that the letters from the Commission Secretary are orders issued in a complaint or investigation proceeding, in accordance with Rule 74 of the defendant Commission's Rules of Procedure such letters would become effective 20 days after service. Under Sections 1731 and 1756 of the California Public Utilities Code plaintiff United could have filed an application for rehearing within 20 days after service of the letters upon it. If the application for rehearing were denied or if the decision on rehearing were adverse, plaintiff United

could then have applied to the Supreme Court of the State of California for a writ of review. Under this theory of the case plaintiff United has failed to exhaust its administrative remedies and the orders have now become final.

Plaintiffs are bound to exhaust the administrative remedies available to them as a condition precedent to seeking judicial relief.

Federal Power Commission v. *Arkansas Power and Light Company*, 330 U. S. 802-803, 91 L. Ed. 1261-1262;

Macauley v. *Waterman S. S. Corporation*, 327 U. S. 540, 544, 90 L. Ed. 839, 842;

Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501, 87 L. Ed. 424;

Rochester Telephone Corporation v. *United States*, 307 U. S. 125, 130, 83 L. Ed. 1147, 1152;

Meyers v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, 82 L. Ed. 638, 644.

Tobin v. *Banks & Rumbaugh*, 201 F. 2d 223.

5. Furthermore, the District Court lacks jurisdiction of the subject matter of this case as there exists an adequate remedy in the Courts of the State of California for the purpose of reviewing any order that may be issued by the defendant Commission pertaining to the subject matter of this action. Section 1756 of the California Public Utilities Code provides for direct review of Commission orders by the California Supreme Court. State courts are bound equally with the Federal courts by the Federal Constitution and laws. Ultimate recourse may be had to the United States Supreme Court by direct appeal from a decision of a state court in favor of the validity of a state statute where its validity is questioned on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

We rely on the following cases:

Public Service Commission of Utah v. *Wycoff Company, Inc.*, 344 U. S. 237, 97 L. Ed. Adv. Ops. 176;
Alabama Public Service Commission v. *Southern Railway*, 341 U. S. 363, 365-366, 95 L. Ed. 1016, 1019;
Alabama Public Service Commission v. *Southern Railway*, 341 U. S. 341, 350-351, 95 L. Ed. 1002-1009.

Defendants are making no claim under Federal law. The claim of jurisdiction to establish rates covering the operations in question is founded upon Section 22 of the Constitution of the State of California. The plaintiffs' claim under the Civil Aeronautics Act is in the nature of a defense.

We quote from the majority opinion of *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 248, 97 L. Ed. Adv. Ops. 176, 183:

"• • • Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. • • •"

We also quote from *Alabama Commission* v. *Southern Railway*, 341 U. S. 341, 349, 95 L. Ed. 1002, 1009:

"* * * Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. * * *

"'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. * * * On the contrary, it is but a recognition * * * that a federal court of equity * * * should stay its hand in the public interest when it reasonably appears that private interests will not suffer. * * *

"'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

6. The only threat which is admitted and the only threat which exists is the expressed intention on the part of the defendant Commission to institute an investigation on its own motion if permitted to do so by the Federal Courts. The action taken by the defendant Commission to date has been preparatory to the institution of an investigation. The appearance and defense of United in such investigation will not impose irreparable injury upon United in an equitable sense.

The expense and annoyance of litigation is part of the social burden of living under government. When the only

ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention. *Petroleum Exploration, Inc.* v. *Public Service Commission of Kentucky,* 304 U. S. 209, 220-222, 82 L. Ed. 1294, 1302, 1303.

7. In reviewing the cases cited in the opinion of the Federal District Court the following aspects of these cases should be considered:

In neither *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, nor *Cloverleaf Co.* v. *Patterson,* 315 U. S. 169, was a three-judge district court invoked and in neither case was the issue of exhaustion of the administrative process raised.

The case of *Bethlehem Steel Corp.* v. *N. Y. State Labor Relations Board,* 330 U. S. 767, is not authority for this Three-Judge District Court to assume jurisdiction. The appeal in the *Bethlehem Steel Corp.* case was from the New York Court of Appeals. We are likewise contending that this matter should be permitted to proceed through the Supreme Court of the State of California.

The case of *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.,* 317 U. S. 456, may be distinguished from the case here under consideration for the following reasons: (1) In the *United Fuel Gas Co.* case the administrative process had been exhausted. (2) The *United Fuel Gas Co.* case had been pending in the Federal courts from July 3, 1935, to December 8, 1942, over seven years, at the time of the argument before the United States Supreme Court, and the majority of the court was of the opinion that the matter should be finally disposed of after such an undue length of time.

8. The rates, fares and charges for transportation by air carriers between the mainland of California and Catalina Island where the transportation over such route has not previously or subsequently passed over the territory of any

other state or country is a matter primarily of local concern to the people of the State of California. In the absence of preemption of the field of regulation by the Federal authority such rates, fares, and charges are subject to the regulatory jurisdiction of the defendant Commission.

Wilmington Transportation Co. v. *Railroad Commission*, 236 U. S. 151, 156, 59 L. Ed. 508, 517;

United Air Lines, Inc., et al. (Decision No. 45624 in Case No. 5271, rendered April 24, 1951, by the Public Utilities Commission of the State of California, 50 Cal. P. U. C. 563. Decision of Commission affirmed by California Supreme Court without opinion (37 A. C. 633) and appeal dismissed by Supreme Court of the United States without opinion (October Term 1951, U. S. No. 464, 96 L. Ed. Adv. Ops. 228).)

9. In the case of *Fisheries* case (*United Kingdom* v. *Norway*), Judgment of December 18, 1951, International Court of Justice Reports 1951, p. 116, involving a dispute between Great Britain and Norway concerning the territorial waters of the latter, it was held by the International Court of Justice that waters lying between the mainland of Norway and the chain of islands screening its western shoreline are territorial waters. The principle of this case compels the conclusion that the territory between the California coast and Catalina Island belongs to the United States and to the State of California. For internal and domestic purposes this territory is within the State of California.

The District Court has erroneously found and concluded that a substantial portion of the waters between the mainland of California and Santa Catalina Island are outside the State of California.

10. In Section 1(21)(a) of the Civil Aeronautics Act of 1938 (49 U. S. C. A. 401 (21)(a)) Congress defined "inter-

state air transportation so as to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * places in the same State of the United States through air space over any place outside thereof."

One of the strongest presumptions known to the law is that Federal authority has not superseded State authority because the superseding of State authority by the Federal government strikes at that delicate balance between Federal and State jurisdictions upon which our Federal form of government is based. The superseding of State authority will be declared only where there is no possible doubt as to the clear intent of the Congress so to supersede State authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary. Nothing must be left to inference or presumption.

Palmer v. *Massachusetts*, 308 U. S. 79, 82-85, 84 L. Ed. 93, 96-99;

Yonkers v. *United States*, 320 U. S. 685, 690-691, 88 L. Ed. 400, 403-405;

North Carolina v. *United States*, 325 U. S. 507, 511, 89 L. Ed. 1760, 1765;

Arkansas R. R. Commission v. *Chicago, Rock Island & Pac. R. R. Co.*, 274 U. S. 597, 603, 71 L. Ed. 1224, 1228.

The term "State" as used in Section 1(21)(a) of the Civil Aeronautics Act (49 U. S. C. A. 401(21)(a)) need not be limited to the territorial boundaries of a state but may reasonably include its jurisdictional boundaries. Certainly the waters between the mainland of California and Santa Catalina are within the jurisdictional boundaries of the State of California. Such being the case, the route in question is not outside of the State of California and hence does

not fall within the definition of "interstate air transportation" in the Civil Aeronautics Act.

Congress has good reason to include air transportation between points in the same state which passes through air space into another State in the definition of "interstate air transportation." Unless such transportation is regulated by the Federal authority it is subject to no regulation. On the other hand, California can regulate the rates for transportation between points in California involving passage over the high seas until this field of regulation is preempted by the Federal authority.

11. The transportation of persons or property by air carrier between the mainland of California and Santa Catalina Island is not interstate or foreign commerce in the general sense or in the Constitutional sense. Conceding for the sake of argument that it is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation". The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through air space outside the jurisdiction of the state, namely through the air space over some other state.

The Federal District Court erred in failing to find and conclude that Congress through the adoption of the Civil Aeronautics Act of 1938 has not preempted the field of economic regulation of air transportation between places in the State of California when that transportation involves passage through the air space over the high seas.

12. While we contend that the letters from the Commission Secretary to plaintiff United are not enforceable or-

ders of the Commission, the Three-Judge district Court appears to have held that such letters are enforceable orders. We, therefore, wish to point out that such letters affect rates; they were sent after considering the contentions of plaintiff United; and, in our opinion, they in no way affect interstate commerce. The jurisdiction of this Three-Judge District Court is based on repugnance of the penalty provisions of the California Public Utilities Code by which the Three-Judge District Court has found the letters may be sought to be enforced by the Commission. Under the circumstances we direct attention to the provisions of the Johnson Act, Section 1342 of Title 28, U. S. Code (28 U.S.C.A. 1342) which prohibits Federal District Courts from enjoining the operation of, or compliance with, orders affecting rates.

13. The provisions of the Constitution of the State of California under which defendants claim jurisdiction over plaintiffs pertain only to rates, fares and charges. Defendants have never claimed jurisdiction over any other aspect of plaintiffs' operations. Clearly in so far as the judgment of the Three-Judge District Court restrains defendants from asserting jurisdiction over matters other than rates, fares and charges of plaintiffs, it is not supported by the record and is in error.

It is submitted that the Three-Judge District Court has acted without jurisdiction in this case and has improperly decided that Congress through the enactment of the Civil Aeronautics Act has preempted the field of regulation of rates of air carriers operating between the mainland of California and Santa Catalina Island. The issues to be decided in this case are vital in their operation on air transportation in the State of California. In many instances the routes of air carriers operating between the principal cities

in California may involve passage through air space over the high seas.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Chief Counsel

/s/ J. THOMASON PHELPS
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Dated March 27, 1953.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a Corporation; and CATALINA AIR TRANSPORT, a Corporation, *Plaintiffs*
CIVIL AERONAUTICS BOARD, *Intervenor*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; et al., *Defendants*

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Before: ORR, Circuit Judge; GOODMAN, District Judge; MURPHY, District Judge.

OPINION

GOODMAN, *District Judge:*

On October 13, 1939, the Civil Aeronautics Board, pursuant to its power under the Civil Aeronautics Act (49 USC 401 et seq.), issued to the plaintiff, Catalina Air Transport, a certificate of public convenience and necessity authorizing it to engage in air transportation between Los Angeles-Wilmington-Long Beach, California, and Avalon on the island of Santa Catalina, (a part of the State of California) over the intervening high seas. Since March 7, 1946, plaintiff, United, with the approval of the Civil Aeronautics Board, has conducted air transportation over the described route and has performed the obligations of plaintiff, Catalina, under the latter's certificate of convenience and necessity. Plaintiff, Catalina, since 1939, and United, since 1946, have been subject, in all respects, including rates of transportation, to the regulations of the Civil Aeronautics Board. In September of 1951, defendant Public Utilities Commission of California advised United in writing that the Commission claimed jurisdiction over the Catalina route and therefore instructed United "to file with this Commission the tariffs covering the service in question." To this, United objected. But in December of 1951, it was again advised by the Commission in writing: "In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct . . . to file with this Commission the tariffs covering the service between Avalon and Long Beach." United and its predecessor, having been regulated by the Civil Aeronautics Board for twelve years as to the Avalon route, United thus found itself confronted with a sudden, belated and somewhat unexplained claim of state jurisdiction. Being fearful of the consequences besetting a victim of conflicting jurisdictions, United filed this action.

The substance of plaintiff's complaint is that the United

States, by the Civil Aeronautics Act of 1938, pre-empted the field of air commerce and transportation involved in the described route of plaintiff; that federal authority is supreme and that the attempt to exercise jurisdiction by the California Public Utilities Commission would subject the plaintiff to irreparable damage. Declaratory relief is sought. As well, it is claimed that certain parts of the Public Utilities Act of California, under which the defendant Commission is authorized to function, are in violation of the Constitution of the United States.

At the beginning of the litigation, upon request of counsel for plaintiff, pursuant to 28 USC §§ 2281, 2284, a three-judge court was appointed to hear and determine the cause. This was proper because the complaint sought to restrain enforcement of a state statute, inter alia, upon the alleged ground of its unconstitutionality. The court assembled. Heretofore it dismissed the action against defendant Brown, Attorney General of California, and granted Civil Aeronautics Board the right to intervene and allowed it to file a complaint as such intervenor. The cause has been heard upon the merits, upon the complaints of plaintiff and intervenor, and the answers of defendants to both complaints.

We do not reach nor decide the issue tendered, that the state statute is unconstitutional.[2] If the cause required the resolution of no other *federal issue*, obviously this court could dissolve itself. See Bowles v. Case, 9 Cir. 149 Fed. 2d 777; affirmed 327 U. S. 92; Ex parte Bransford, 310 U. S. 354; cf. Farmers Cin Co. v. Hayes, 54 Fed. Supp. 43.

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[2] The Supreme Court has made the frequent admonition that federal courts should refrain from invalidating statutes on constitutional grounds when there are other adequate grounds for decision:

"*Hurd* v. *Hodge*, 334 U.S. 24, 30, 68 S. Ct. 847, 92 L. Ed. 1187; *Rescue Army* v. *Municipal Court*, 1947, 331 U.S. 547 at page 569, 67 S. Ct. 1409, 91 L. Ed. 1666; *Alma Motor Co.* v. *Timkin-Detroit Axle Co.*, 1946, 329 U.S. 129, 136, 67 S. Ct. 231, 91 L. Ed. 128; *Arkansas Fuel Co.* v. *State of Louisiana ex rel. Muslow*, 1938, 304 U.S. 197, 202, 58 S. Ct. 832, 82 L. Ed. 1287; *Banker* v. *Grice*, 1898, 169 U.S. 292, 18 S. Ct. 323, 42 L. Ed. 748.

There would appear to be no good reason why this doctrine should not apply to courts constituted as this one is.

But there are other adequate bases of federal jurisdiction. 28 USC 1331; 28 USC 1337; 28 USC 2201.[3] Such being the case, this Court, having properly acquired jurisdiction, has power to consider and dispose of all questions involved in the suit. Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298; Fireman's Ins. Co. v. Beha D. C. 30 Fed. 2d 539; Fisher v. Brucker D. C. Fed. 2d 774.

The Civil Aeronautics Act of 1938 defines interstate air transportation to mean "The carriage by aircraft of persons or property . . . between places in the same state of the United States through the air space over any place outside thereof."

The record here shows, by stipulation, that there is a distance of about 30 miles between the shore line of the United States and the Santa Catalina Island. We have no difficulty in finding, and so find, that a substantial portion of those 30 miles lies over the high seas and is not within the State of California. Hence it follows that air transportation through the air space thereover is over a place outside of the State of California.

The Congress, by the statute, assumed jurisdiction over this area. This it had the power to do. In this field it has supremacy. Since the Congress had the power to assert federal jurisdiction, the plain language of the statute compels the conclusion that the Public Utilities Commission of the State of California has no jurisdiction or power to regulate in any manner the transportation activities of the plaintiff over the route in question.

Defendants urge that we should decline jurisdiction here in order to allow the state courts to finally adjudicate whether defendant Commission has jurisdiction. They cite the now-oft-quoted case of Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341. But that case had to do with alleged constitutional improprieties in the enforcement of a state statute, which the Supreme Court said, federal courts should leave to the decision of state courts. Here the Court must appraise the reach of a fed-

[3] § 1337 gives jurisdiction irrespective of the amount in controversy. Even so, the evidence does sufficiently establish an amount in controversy in excess of $3000.

eral statute when in conflict with state law. In that field it should assert and not forego its jurisdiction. Rice v. Santa Fe Elevator Corp., 331 U. S. 218. See also Cloverleaf Co. v. Patterson, 315 U. S. 169.

It is contended by the defendant Commission that the cause is not ripe enough for equitable relief. It admits that it has, in writing, claimed jurisdiction, but alleges that until the defendant Commission actually holds a hearing and formally seeks to embrace plaintiff, this action is premature. Upon the record here, we hold this contention to be without merit. Bethlehem Steel Corp. v. N. Y. State Labor Relations Board, 330 U. S. 767; Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U. S. 456; Penn. v. W. Va., 262 U. S. 553.

Plaintiff is entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff in its operations in the described route and permanently forbidding and enjoining the defendants from, in any manner, interfering with such paramount jurisdiction.

Present findings and decree accordingly.

Dated: December 3, 1952.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a Corporation; and CATALINA AIR TRANSPORT, a Corporation, *Plaintiffs*,

CIVIL AERONAUTICS BOARD, *Intervenor*,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California, *Defendant*

Before: Hon. WILLIAM E. ORR, Circuit Judge, Hon. LOUIS E. GOODMAN, District Judge, Hon. EDWARD P. MURPHY, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

From the pleadings and evidence in the above-entitled action, the Court finds:

1. The plaintiff Catalina Air Transport is, and at all times mentioned herein was, a corporation organized and incorporated under the laws of the State of California.

2. The plaintiff United Air Lines, Inc., is, and at all times mentioned herein was, a corporation organized and incorporated under the laws of the State of Delaware and is and was a citizen resident of the State of Delaware.

3. The defendant Public Utilities Commission of the State of California is a regulatory Commission of the State of California; and the defendants Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and

Peter E. Mitchell, are members of said Commission and collectively constitute said Commission, and are citizens and residents of the State of California, and have and maintain the principal office of the Commission within the State of California and the district of this Court. The defendants Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps are legal advisers of the said Public Utilities Commission, are citizens and residents of the State of California, and maintain their offices within the said principal office of the Public Utilities Commission.

4. The intervenor Civil Aeronautics Board is an agency of the United States created by and charged with responsibility for, among other things, the administration and enforcement of the economic regulatory provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 *et seq.*). That Act empowers the Board to issue certificates of public convenience and necessity authorizing air carriers to engage in interstate air transportation (49 U.S.C. 401(2), 401(21), 481). Interstate air transportation is defined by the Civil Aeronautics Act to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire—in commerce between—places in the same State of the United States through the air space over any place outside thereof" (49 U.S.C. 401(21)(a)). Tariffs for such interstate air transportation must be filed with the Board and observed by the carrier (49 U.S.C. 483), and rates and practices in interstate air transportation may be prescribed by the Board (49 U.S.C. 484, 491, 642). Service may not be suspended or terminated except by leave of the Board (49 U.S.C. 481(k)), and contracts between air carriers relating to interstate air transportation, including contracts whereby one carrier conducts operations on behalf of another, must be filed with the Board for its approval or disapproval (49 U.S.C. 488, 492).

5. Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles.

6. On October 13, 1939, the Civil Aeronautics Authority, now known as the Civil Aeronautics Board, issued a certifi-

cate of public convenience and necessity to Wilmington-Catalina Airline, Ltd., the predecessor of the plaintiff Catalina Air Transport, authorizing the air transportation of persons and property between Wilmington, on the mainland of California, and Avalon, on Santa Catalina Island, California. This award was based upon findings that the boundaries of California did not extend beyond a distance of three miles from the shoreline of the mainland, and beyond a distance of three miles from the shoreline of Santa Catalina Island. Since aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather certificate,* 1 Civil Aeronautics Authority Reports 431.

7. On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airline, Ltd. to Los Angeles, California, so that the carrier was then authorized to conduct operations between Los Angeles and Avalon, Santa Catalina Island, via the intermediate point Wilmington-Long Beach, California. At the same time, the Board reissued the certificate in its entirety to reflect the change of the carrier's name from Wilmington-Catalina Airline, Ltd., to Catalina Air Transport. *Catalina Air, Service to Catalina Island,* 2 Civil Aeronautics Board Reports 798. Such amended certificate has ever since continued in full force and effect.

8. Operations continuously were conducted by Wilmington-Catalina Airlines, Ltd. and by Catalina Air Transport over the routes hereinbefore described in accordance with and pursuant to the certificates of public convenience and necessity issued by the Civil Aeronautics Board, from October 13, 1939 until the carrier's equipment was requisitioned by the United States Government for military purposes in 1942. On July 23, 1942, the Board authorized the carrier to suspend operations because of the mentioned equipment requisition. This authorized suspension of service continued for the duration of the war and thereafter until

operations over the route were begun by the plaintiff United Air Lines, Inc. Tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, during all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor Catalina Air Transport; and operations were otherwise conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted common carriage by aircraft for compensation and hire.

9. On June 3, 1946, the Civil Aeronautics Board approved an operating contract between the plaintiff United Air Lines, Inc. and Catalina Air Transport, dated March 7, 1946, whereby it was agreed that United would perform and discharge all of the obligations of Catalina Air Transport under its certificate of public convenience and necessity. United Air Lines, Operation of Catalina Air Transport, 6 Civil Aeronautics Board Reports 1041. Various supplemental agreements relating to the rates and fares to be charged to the public for the transportation provided by United subsequently were filed with and approved by the Board, together with various other agreements relating to miscellaneous details of the operation. Said operating contract, and the approval thereof by the Board, have been continuously in effect since the date of initial approval by the Board, and operations have been and are being conducted by United thereunder. Tariffs for the carriage of persons and property have been, and are, maintained on file by United with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, and operations have been, and are being, otherwise conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted, and constitute, common carriage by aircraft for compensation and hire.

10. On September 20, 1951, the defendant Public Utilities Commission advised United by letter that the Commission had jurisdiction as to the rates and charges for the operation in question, and directed United to file its tariffs therefor with the Commission. United objected, asserting that

its operations were subject only to the control and jurisdiction of the Civil Aeronautics Board. Thereafter, on December 27, 1951, the Commission again advised United by letter that the Commission had jurisdiction over the Santa Catalina operations, and again directed United to file its tariffs with the Commission. *[Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission.]

11. The defendants by their answers to the complaints herein and by their testimony disclaim any present intention to institute proceedings against United for the recovery of the said penalties unless and until such time as the Public Utilities Commission formally finds and declares that it has jurisdiction over the operations in issue in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction, to which proceeding the plaintiff air carriers will be made parties, and then only if United thereafter fails to file its tariffs with the Commission after having been formally ordered to do so. The defendants state that they will cause such a proceeding to be instituted before the Commission unless this Court resolves the jurisdictional dispute between the parties. The prior assertions of jurisdiction were made by the Commission pursuant to the advice and recommendation of the Chief Counsel for the Commission, the defendant Everett C. McKeage, and he states that he will again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved with respect to tariffs, rates and charges. The plaintiff carriers will incur expenses in excess of $3,000 in defending any such proceeding before the defendant Commission.

12. Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective

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* Struck out in copy.

tariffs being on file with the defendant Public Utilities Commission. The defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the defendant Public Utilities Commission.

13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United.

14. The Court has not in these findings made any findings as to the constitutionality of the Acts of the Legislature of the State of California imposing penalities referred to in the complaint, or the question as to whether such Acts are applicable to the plaintiffs as air carriers, for the reason that the same involve the constitutionality of state laws and a decision on said questions is not necessary to final determination of this controversy.

Conclusions of Law

Upon the basis of the foregoing findings, the Court concludes:

1. This Court has jurisdiction under 28 U.S.C. 1331 in that the amount in controversy exceeds $3,000, exclusive of

interest and costs, and the case arises under the Constitution (Article 1, Section 8) and laws of the United States (Civil Aeronautics Act of 1938, 49 U.S.C. 401, et seq.); under 28 U.S.C. 1337 in that the case arises under an Act of Congress regulating commerce (Civil Aeronautics Act of 1938, 49 U.S.C. 401 et seq.); and under 28 U.S.C. 2201 in that an actual controversy exists between the parties concerning the question of whether the plaintiff air carriers are to be regulated by the Public Utilities Commission of the State of California or by the Civil Aeronautics Board.

2. The Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and jurisdiction as a plaintiff-intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the defendants with its jurisdiction.

3. The complaint herein seeks, *inter alia*, to restrain the enforcement of a statute of the State of California upon the grounds that certain penalties provided therein which may be applicable to air carriers are so unreasonable and oppressive as to be in violation of the Fourteenth Amendment to the Constitution of the United States. A substantial question would have been presented as to the constitutionality of these penalty provisions, if reached, and the appointment of a three-judge Court pursuant to 28 U.S.C. 2281 and 2284 was appropriate and required for the purpose of enabling the Court to resolve all issues presented by the air carrier plaintiffs. Having properly acquired jurisdiction, this statutory three-judge Court has jurisdiction to consider and dispose of this case even though its disposition is on grounds other than those relating to the constitutional issue which necessitated the assembling of the Court.

4. The proceeding before the defendant Public Utilities Commission which the defendants, unless precluded by action of this Court, intend to institute against the plaintiff air carriers will subject said air carriers, and possibly the public, to irreparable injury if the said Commission has no jurisdiction in the premises, and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board. These factors, coupled with the risks and expenditures to which the plain-

tiffs may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties, are such as to entitle both the plaintiffs and the intervenor to declaratory relief, and injunctive relief against actions which the defendants might otherwise institute concerning a subject matter over which the defendant Commission and the State of California are hereinafter found to lack jurisdiction. Plaintiffs have no plain, speedy and efficient remedy in the Courts of the State of California, or otherwise, than by this action. Further, since the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law, this Court should decide the issues tendered irrespective of the existence or adequacy of any state Court remedies.

5. Without reaching or considering the status of the waters of the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, as territorial waters of the State of California for regulatory purposes, we conclude and hold that the intervening waters between these marginal belts are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

6. Congress has power to regulate all phases of transportation between places in the same State when that transportation involves passage through or over territory or waters outside the State, and it has asserted that power in the field of air transportation through the adoption of the Civil Aeronautics Act of 1938, and by declaring therein that all such common carrier transportation by aircraft constitutes interstate air transportation. The Civil Aeronautics Act provides for complete and detailed regulation by the Civil Aeronautics Board over all phases of interstate air transportation, including rates and charges therefor, and the Board has regulated and is regulating all phases of plaintiffs' operations between Santa Catalina Island and the mainland of the State of California. Such operations by the plaintiff air carriers constitute interstate air transportation as defined by the said Act, and the powers con-

ferred upon and exercised by the Board leave no room for State regulation of these operations.

7. The plaintiffs and the intervenors are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiffs in their mentioned operations, and permanently forbidding and enjoining the defendants from, in any manner, interfering with such exclusive jurisdiction.

Dated this 27th day of January, 1953.

(S.) WM. T. ORR,
Circuit Judge.

(S.) LOUIS GOODMAN,
District Judge.

(S.) EDWARD P. MURPHY,
District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, *Plaintiffs,*

CIVIL AERONAUTICS BOARD, *Intervenor,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. MCKRAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisors of the Public Utilities Commission of the State of California, *Defendants*

Before: HON. WILLIAM E. ORR, *Circuit Judge;* HON. LOUIS E. GOODMAN, *District Judge;* HON. EDWARD P. MURPHY, *District Judge.*

JUDGMENT

In the above-entitled action the defendants Public Utilities Commission of the State of California, Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, appeared and answered by their attorneys, Hon. Everett C. McKeage, Chief Counsel, and Mr. J. Thomason Phelps; the Civil Aeronautics Board, by leave of the court duly had and obtained, appeared and filed a complaint in intervention by their attorneys, Messrs. Chauncey Tramutolo, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, James E. Kilday, Special Assistant to the Attorney General, Emory T. Nunneley, Jr., General Counsel, and O. D. Ozment, Assistant to General Counsel, and said defendants answered said complaint in intervention. At the inception of said case the plaintiffs properly requested the submission thereof to a three-judge court, pursuant to the provisions of 28 USC Secs. 2281, 2284, for the reason that said action raised the question of the unconstitutionality, under the Fourteenth Amendment to the Constitution of the United States, of the acts of the Legislature of the State of California imposing penalties referred to in the complaint, and such a court was assembled, consisting of Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, and Hon. Edward F. Murphy, District Judge. The cause came on regularly for trial on the 21st day of November, 1952, and evidence, both oral and documentary, was introduced, and said matter was argued by the parties and submitted to the court, and the court, being now fully advised in the premises and having filed herein its findings of fact and conclusions of law,

Now, therefore, by reason of the law and the findings aforesaid, it is by the court here ordered, adjudged, and decreed:

1. That the Civil Aeronautics Board has exclusive jurisdiction over the plaintiffs in their operations over the route described in the complaint, and the defendants have no jurisdiction or power of regulation over the same;

2. That the defendants and their employees, agents and attorneys, and all persons claiming by, through or under them, be and they hereby are permanently prohibited and enjoined from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board, or from in any way controlling or regulating said route;

3. The court has not by this decree passed upon or adjudged the constitutionality or validity of any Acts of the Legislature of the State of California imposing penalties, nor has it passed upon the question as to whether air lines such as plaintiffs' come within the purview of said Acts, and this judgment is without prejudice to any right of the plaintiffs or the intervenor with regard thereto. The reason that the court has not passed on such questions is the policy of the court not to pass upon the constitutionality or construction of state statutes, the constitutionality or construction of which has not been passed upon by the courts of the state, where the same is not necessary to a determination of the controversy before the court, and the court finds that a decision on those questions is not necessary to the determination of the controversy here involved.

Dated this 27th day of December, 1952.

(S.) WM. E. ORR,
Circuit Judge;

(S.) LOUIS GOODMAN,
District Judge;

(S.) EDWARD P. MURPHY,
District Judge.

Entered in Civil Docket January 28, 1953.

N THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., et al., *Plaintiffs*,

CIVIL AERONAUTICS BOARD, *Intervenor*,

vs.

UBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al., *Defendants*

ORDER DENYING MOTION FOR A NEW TRIAL

Defendants' motion for a new trial herein was argued nd submitted. Upon the argument and in the briefs sub-itted, counsel for defendants cited the case of Public Serv-e Commission of Utah v. Wycoff Company, 344 U. S. 237, ecided December 22, 1952. We find the cited case to be lainly distinguishable here. The motion for a new trial denied.

Dated: February 20, 1953.

WM. E. ORR,
United States Circuit Judge;
E. P. MURPHY,
United States District Judge;
LOUIS E. GOODMAN,
United States District Judge.

Original filed Feb. 20, 1953, with Clerk, U. S. Dist. Court, an Francisco.

APPENDIX B

The first sentence of the second paragraph of Section 22 Article XII of the California Constitution:

Sec. 22. • • •

"Said commission shall have the power to establish rates of charges for the transportation of passengers

and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff or rates, established by said commission than the rates, fares and charges which are specified in such tariff. * * *"

Sections 1701 through 1706, 1731, 1756, and 2107 of the California Public Utilities Code:

"1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

"1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or-

prospective consumers or purchasers of such gas, electricity, water, or telephone service.

"1703. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

"1704. Upon the filing of a complaint, the commission shall cause copy thereof to be served upon the corporation or person complained of. Service in all hearing, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure, and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than 10 days before the time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date.

"1705. At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own

force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

"1706. A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

"1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

"1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

"2107. Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."

Sections 1331, 1337, 1342, and 2201 of Title 28, United ates Code:

"1331. The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

"1337. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

"1342. The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and

made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

"(2) The order does not interfere with interstate commerce; and,

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State."

"2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, Section 111, 63 Stat. 105."

Sections 1(2), 1(10), 1(21), 403, 404(a), and 404(b) of the Civil Aeronautics Act of 1938. (49 U. S. C. A. 401(2), 401(10), 401(21), 483, 484(a) and 484(b)):

"401(2). 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be ... the public interest."

"401(10). 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

"401(21). 'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, means the carriage by aircraft of persons

or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

"(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

"(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

"483(a). Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also

state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

"(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulation prescribe.

"(c) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this

section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

"(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates. June 23, 1938, c. 601, Title IV, § 403, 52 Stat. 992; 1940 Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 F. R. 2424, 54 Stat. 1235."

"484(a). It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any un-

due or unreasonable prejudice or disadvantage in any respect whatsoever."

EXHIBIT C

Copy

Commissioners: Richard E. Mittelstaedt, President; Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell.

PUBLIC UTILITIES COMMISSION

State of California

August 6, 1951

File No. 360-1

Address All Communications to the Commission — California State Building San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

We understand that the United Air Lines, Inc., is providing passenger transportation service by air for the public generally between Long Beach and Avalon, Santa Catalina Island.

A review of our official files fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic.

It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter.

Yours very truly,

(Sgd.) WARREN K. BROWN,
Director of Transportation.

Letterhead of

UNITED AIR LINES

September 10, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Re: Your File No. 360-1.

Dear Mr. Brown:

Thank you for your kind consideration in sending to me a copy of your letter of August 6, 1951.

With particular reference to that letter, United Air Lines, Inc. is providing air transportation for the carriage of persons and property between Los Angeles and Avalon and also between Long Beach and Avalon, in both directions.

We have on file with the Civil Aeronautics Board our tariffs covering the fares, rates and charges applicable to this service. Inasmuch as the Public Utilities Commission of the State of California does not have jurisdiction over the regulation of this service, we have not filed a tariff with your Commission.

Very truly yours,

W. DELANEY DILWORTH,
Traffic Manager.

pss:ab

cc: John T. Lorch, Esq.
Oscar A. Trippett, Esq.
Charles Stearns, Esq.
Paul Hebard—EXORD

PUBLIC UTILITIES COMMISSION

State of California

September 20, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago, Illinois

Dear Mr. Dillworth:

It has been brought to the attention of this Commission that United Air Lines is performing air transportation between Los Angeles, California, and Avalon, on Santa Catalina Island, and also between Long Beach, California, and Avalon, without having filed with this Commission its tariffs covering such transportation. It is our understanding that this operation is intrastate.

In your letter of September 10, 1951, to Mr. Brown, Director of Transportation of this Commission, you take the position that the Public Utilities Commission of California does not have jurisdiction over the service in question.

This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question.

Very truly yours,

(Sgd.) R. J. PAJALICH,
Secretary.

Letterhead of
UNITED AIR LINES

October 11, 1951

Mr. R. J. Pajalich, Secretary
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Subject: Letter of September 20, 1951
File No. 360-1

Dear Mr. Pajalich:

The matter of filing a tariff for our Catalina service with the Public Utilities Commission for the State of California was referred to our Law Department for their review. We have just been advised that their opinion will be available this week, and we plan to communicate with you as quickly as it is received.

Very truly yours,

W. DELANEY DILWORTH
Traffic Manager

LGB:hk

PUBLIC UTILITIES COMMISSION

State of California

November 6, 1951

File No. 360-1

Address All Communications to the Commission — California State Building, San Francisco 2, California

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

This refers to our exchange of letters regarding the filing of a tariff covering your service to Santa Catalina Island.

Under date of October 11 you wrote us to the effect that the opinion of your law department in this matter would be available that week and you would communicate with us when it was received.

Can you now inform us what position you propose taking in this matter?

Yours very truly,

(Sgd.) WARREN K. BROWN,
Director of Transportation

November 30, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1

Dear Mr. Brown:

This will acknowledge receipt of your letter of November 6, 1951, regarding our service to Santa Catalina Island.

This matter is now in the hands of our local counsel in Los Angeles and you will hear from them within the next few days.

Yours very truly,

W. D. DILWORTH
Traffic Manager

THD:ru

TRIPPET, NEWCOMER, YOAKUM & THOMAS
Lawyers

458 South Spring Street
Los Angeles 13

5 December 1951

AIR MAIL

WILSON E. CLINE, ESQ.
Assistant Counsel
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1
(United Air Lines, Inc.)

Dear Mr. Cline:

You probably are aware of the fact that rather extended correspondence has been exchanged between the Public Utilities Commission and United with respect to that carrier's operation between Santa Catalina Island and the Los Angeles area. Such correspondence has been handled by Messrs. Brown and Pajalich on behalf of the Commission, and personnel in United's general office in Chicago. The question involved is whether or not United is required to file with your Commission tariffs covering the Catalina operation.

The matter has now been referred to us by our client for further handling, and since it concerns a question of law, it seemed appropriate to me that I should address this communication to you.

It is our position, of course, that United is not subject to the jurisdiction of your Commission with respect to transportation furnished by it between Catalina and the mainland, for all of the reasons which we have heretofore advanced in connection with the Los Angeles-San Francisco air coach fare matter now on appeal to the Supreme Court of the United States. There is present in the Catalina situation an additional factor which, in our opinion, serves to remove

any possible doubt with respect to the question. This is the fact that, while the termini of the route; i. e., Avalon and Long Beach-Los Angeles, are within the State of California, all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstance, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U.S.C. 401 (10), (20) and (21)). Ipso facto, this precludes the exercise of control by the state.

I trust that you will agree with the position taken by us, so that the problem may thereby be disposed of. In any event, I shall be pleased to hear from you on the matter.

Yours very truly,

of TRIPPET, NEWCOMER, YOAKUM & THOMAS

CS/rg

(Seal)

PUBLIC UTILITIES COMMISSION

State of California

File No. 360-1

Address All Communications to the Commission

California State Building,
San Francisco 2, Calif.,
December 27, 1951.

Mr. Charles Stearns, Esq.,
Trippet, Newcomer, Yoakum & Thomas,
458 South Spring Street,
Los Angeles, California.

Re: File No. 360-1

(United Air Lines, Inc.)

DEAR MR. STEARNS:

Your letter of December 5 to Mr. Cline has been referred to this office for reply.

You, of course, are fully aware of the position which has been taken by the Commission with respect to intrastate fares of air carriers operating within the State of California, which position is now supported by decisions of the California Supreme Court.

You now contend that the route between Avalon and Long Beach-Los Angeles traverses the high seas and that state regulation is precluded by reason of the claimed exclusive Federal occupancy of this field of regulation. We have given the sections of the Civil Aeronautics Act to which you have referred us careful consideration. 49 U. S. C. 401(20) is not applicable as it relates to "air commerce". We interpret 49 U. S. C. 401(21) to define "interstate air transportation", "overseas air transportation", and "foreign air transportation" separately and not jointly.

Interstate air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any state of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof;* or between places in the same Territory or possession of the United States, or the District of Columbia.

Overseas air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States.

Foreign air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

The transportation of persons or property by air carrier between Avalon and Long Beach-Los Angeles is not inter-

state or foreign commerce in the general sense or in the Constitutional sense. See *Wilmington Transportation Company* v. *Railroad Commission* (1913), 166 Cal. 741, affirmed (1915), 263 [236] U. S. 151, 56 [59] L. Ed. 508. Conceding for the sake of argument that such transportation is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation." The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through the air space over some other state. Hence the Congress has not occupied the field in so far as the local transportation by aircraft between Avalon and Long Beach-Los Angeles is concerned, and such transportation remains subject to regulation pursuant to the applicable provisions of the California Constitution.

In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct your client United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.

Very truly yours,

(S.) R. J. PAJALICH,
Secretary.
